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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-5567

DANIEL JOSEPH BAKER,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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BRIEF FOR THE RESPONDENT IN OPPOSITION

The State of Georgia, by and through the Attorney General of the State of Georgia, respectfully requests that this Court deny the petition for writ of certiorari, which seeks review of the Georgia Supreme Court's decision in this case. That opinion is reported 243 Ga. 710, 257 S.E.2d 192 (May 31, 1979), and is attached to the petition as Appendix A.

PART I

QUESTIONS PRESENTED

1.

Whether under the facts of this case, the Georgia Supreme Court properly reviewed and affirmed the jury's finding that Petitioner's death penalty was supported by aggravating circumstances listed under Ga. Code Ann.§§ 27-2534.1(b)(2) and (b)(7)?

2.

Whether armed robbery may still be considered a capital felony for purposes of Ga. Code Ann. § 27-2534.1(b)(2), which authorizes the imposition of the death penalty when the jury finds that a murder has been committed in the course of another capital felony, when the death penalty may no longer be imposed in Georgia for the crime of armed robbery?

PART TWO

STATEMENT OF THE CASE

Petitioner seeks to have this Court review the decision of the Georgia Supreme Court in Baker v. State, 243 Ga. 710, 257 S.E.2d 192 (May 31, 1979), in which the Petitioner's conviction and death sentence for murder were upheld. The Petitioner was convicted in Gwinnett County, Georgia in November, 1978. A summary of the evidence adduced at Petitioner's trial is contained in the Georgia Supreme Court's opinion. (Id. 243 Ga. at p. 710-711; Petitioner's Appendix A, p. 2a).

A somewhat more detailed statement of facts is as follows: On the evening of May 5, 1978, Dennis Beatenbo and two of his friends had stopped at a Holiday Inn in Norcross, Georgia for drinks. At approximately 12:00 a.m. Dennis left his friends to retrieve his automobile which had been parked at another location. (T. 68-69, 75-76).[1/] On that same evening the Petitioner and Rick Massey had been drinking and also driving around the Norcross community in Massey's automobile. Seeing Dennis Beatenbo walking to his car, Massey and the Petitioner asked him if he needed a ride. (T. 149-150). In exchange for the ride Dennis Beatenbo offered the Petitioner and Massey some liquor which was contained in a bottle on the front seat of his automobile. (T. 70, 150, 261). In a statement to the police the Petitioner related that when Beatenbo left Massey's car to retrieve the liquor, Massey suggested that they "roll" him. (T. 150). The three men rode around the area, stopped to get a coke to mix with the liquor and later drove up to an isolated spot near a lake. (T. 150). Thereafter, Dennis Beatenbo began to feel nauseated so Massey opened the back

1/References in this brief to the pagination of the official transcript are indicated by T. ____; references to the official record are indicated by R. _____.

door so that Dennis could get out of the car. (T. 151). The Petitioner then placed a newly purchased .25 caliber pistol in his belt, and walked towards the back of the car near Dennis Beatenbo. (T. 151).

In his confession to the police the Petitioner related the following events. Dennis Beatenbo was lying on the back seat with his head hanging over. The Petitioner then smashed Beatenbo in the head with the liquor bottle, causing the bottle to break. Beatenbo raised up and fell out of the other side of the car, lying with his back on the ground. (T. 151, 251). The Petitioner then took the victim's wallet and watch while Massey observed. (T. 151). In Petitioner's own words, "I reached in my belt with my right hand and pulled out my pistol and the guy was still lying on his back. I pointed the gun at the man and pulled the trigger, I don't know how many times I shot him, but I could hear him moaning and trying to say something." (T. 151). The Petitioner and Massey then left the scene and drove to a trailer where the Petitioner stayed. On the way there Petitioner gave Massey eleven dollars of the twenty-two dollars found in the victim's wallet. He then threw the wallet in the woods. (T. 152).

The Norcross Police discovered the victim's body the next morning. (T. 78). Doctor Donald Dove, State Medical Examiner, testified that the victim had suffered a crushing blow to his face which broke his nose and damaged his eye and facial tissues. (T. 102). Doctor Dove further testified that the victim had received four deliberate gunshot wounds, three of which were the result of the pistol being pressed firmly against his body and fired into his chest. One bullet was also fired in the victim's scrotum area. (T. 97, 101-102). Doctor Dove stated his belief that the fourth shot was fired after the victim had died. (T. 101).

Witness Bobby Barnes testified that on Friday, May 5, 1978, the Petitioner said to him that he had killed a man by hitting him in the face with a bottle and then shooting him. (T. 82). Barnes also testified that he had seen the Petitioner with a gun at the Petitioner's trailer, and that the Petitioner told him he had taken twenty-two dollars from the victim's wallet. (T.83-84).

After the Petitioner's arrest, he informed the police where to find the pistol which was used in the murder, and Massey led the police to Dennis Beatenbo's watch which had been thrown away. (T. 132, 162). During the course of the Petitioner's questioning by police, he stated that Massey had never suggested killing Dennis Beatenbo, but suggested only that they "roll" him. (T. 158). When Detective Jack Burnette questioned the Petitioner as to why he had killed the victim, Baker answered "Just to watch him die." (T. 168).

Petitioner was convicted of murder, and following the punishment phase of the trial, the jury found that the imposition of the death penalty was justified based on the following aggravating circumstances: (1) the murder was committed while the Petitioner was engaged in the armed robbery of the victim; and (2) the murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture to the victim or depravity of the mind on the part of the Petitioner. (R. 12).

PART III

REASONS FOR NOT GRANTING THE WRIT

A. THE GEORGIA SUPREME COURT PROPERLY PERFORMED ITS REQUIRED DUTY TO REVIEW ALL DEATH PENALTIES IMPOSED UNDER THE GEORGIA CAPITAL PUNISHMENT STATUTORY SCHEME, AND PROPERLY AFFIRMED THE JURY'S FINDING IN THE INSTANT CASE THAT THE EVIDENCE SHOWED SUFFICIENT STATUTORY AGGRAVATING CIRCUMSTANCES UNDER GA. CODE ANN. §§ 27-2534.1(b)(2) AND (b)(7) TO WARRANT THE IMPOSITION OF THE DEATH SENTENCE AGAINST THE PETITIONER.

Petitioner initially contends that the Supreme Court of Georgia has allegedly adopted such a broad interpretation of Ga. Code Ann. § 27-2534 (b)(7)[2/] that the affirmance of the Petitioner's death sentence based in part on the jury's finding of that aggravating circumstance violates the Eighth and Fourteenth Amendments to the Constitution of the United States. Respondent submits that this contention is erroneous and the Georgia Supreme Court properly concluded that the Petitioner's sentence was authorized under the aforesaid code section.

As noted in Part II of this brief, two statutory aggravating circumstances were found to exist by the jury which had tried the Petitioner's case. These were: (1) "The offense of murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture to the victim or depravity of mind on the part of the defendant," and (2) "The offense of murder was committed while

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2/ Georgia's seventh aggravating circumstance authorizes the jury to impose the death penalty when it finds beyond a reasonable doubt that: "The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."

the offender was engaged in the commission of an additional felony, to wit: armed robbery of Dennis Beatenbaugh." (T. 309-310; R. 12). [Petitioner's attack upon the second stated aggravating circumstance will be addressed in the latter portion of this brief.] Petitioner's death sentence was affirmed by the Georgia Supreme Court based upon both of the jury findings. Baker v. State, 243 Ga. 710, 257 S.E.2d 192 (May 31, 1979).

In Gregg v. Georgia, 428 U.S. 153, 201, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), the plurality opinion addressed the issue of whether Ga. Code Ann. § 27-2534.1(b)(7) was overly broad and vague. The plurality acknowledged that an open-ended construction need not be applied by the Georgia Supreme Court to the language of the statute, and thus, the constitutional validity of that code section was upheld.

The Georgia Supreme Court has recognized its obligation under the Georgia statutory provisions which mandate that it thoroughly review death sentences,[3/] and specifically with regard to Ga. Code Ann. § 27-2534.1(b)(7), it has stated that it has no intention of permitting that code section to become a "catchall" for cases simply because no other statutory aggravating circumstance has been raised by the evidence. Harris v. State, 237 Ga. 718, 730, 230 S.E.2d 1 (1976), cert. den. 431 U.S. 933 (1977), rehearing den. 434 U.S.

3/ Under Ga. Code Ann. § 27-2537(c), the court must review all death penalty cases to determine:

> "(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and (2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 27-2534.1(b), and (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

882 (1977), modified as to sentence only, Harris v. Hopper, 243 Ga. 244, ___S.E.2d ___ (1979). The court further stated in Harris its intention to restrict its approval of death sentences supported by Code § 27-2534.1(b)(7) to those cases which lie not on the periphery of the statutory boundaries, but to only approve those sentences which are so outrageous and vile so as to lie at the core of the statutory intent. As the prior statement of facts amply demonstrates, the facts surrounding the murder of Dennis Beatenbo fall within the purview of Code § 27-2534.1(b)(7).

Petitioner cites this Court to Godfrey v. State, 243 Ga. 302, 253 S.E.2d 710 (Feb. 27, 1979), cert. granted, ___U.S.___ (Oct. 9, 1979), and argues that similar questions of proper appellate review procedures are present in that case and in the case sub judice. Certiorari was granted in Godfrey specifically on the issue of whether in affirming the imposition of the death penalty in that case, the Georgia Supreme Court had adopted an overly broad and vague construction of Ga. Code Ann. § 27-2534.1(b)(7) so as to violate the Eighth and Fourteenth Amendments to the United States Constitution. By this Court's own wording of the issue, the question in Godfrey to be examined refers to the imposition of the death penalty in that case. There are a number of distinguishin features between Godfrey and the instant case.

Initially it should be noted that in Godfrey, Code § 27-2534.1(b)(was the only aggravating circumstance found by the jury. Godfrey supra at p. 310. In the instant case the jury found a second aggravating circumstance in addition to (b)(7). This second aggravatin circumstance, of course, was that the murder had been committed during the course of the armed robbery of the victim. The Georgia Supreme Court has consistently interpreted armed robbery as a capital

felony for the purpose of constituting a statutory aggravating circumstance under Ga. Code Ann. § 27-2534.1(b)(2). See, Peek v. State, 239 Ga. 422, 431-432, 238 S.E.2d 12 (1977), cert. den., ___U.S.___, 99 S.Ct. 218 (1978); Bowden v. State, 239 Ga. 821, 829, 238 S.E.2d 905 (1977), cert. den., 435 U.S. 937 (1978).

Additionally, unlike the situation in Godfrey, the jury found that the murder in the instant case, "was outrageously and wantonly vile, horrible and inhuman in that it involved torture to the victim or depravity of mind on the part of the defendant." (T. 309). In Godfrey, the jury in its written findings, stated as the aggravating circumstance supporting the death penalty, only that "the offense of murder was outrageously or wantonly vile, horrible and inhuman." Godfrey, supra, at p. 310. Thus, a clear distinction appears between the facts in Godfrey and this case in the area of aggravating circumstances.

The Petitioner's extended argument that the Georgia Supreme Court attributed an erroneous finding to the jury (an alleged finding of aggravated battery) does not take into consideration the court's use of the disjunctive phraseology in its opinion. Specifically, the Georgia Supreme Court stated,

> "In addition, the jury found that the offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim. Code Ann. § 27-2534.1(b)(7).
>
> We conclude that the evidence supports the jury's finding of these statutory aggravating circumstances." Baker, supra at p. 712.

By citing the above, the Georgia Supreme Court simply held that the jury's finding fell within the above language. The jury specifically did find two of the three listed illustrations of the "in that" clause under (b)(7). These were that the murder involved torture of the victim or depravity of mind on the part of the defendant. The listing of the third aggravating illustration of the "in that" clause by the Georgia Supreme Court in no way effects the jury's finding that the other two aggravating illustrations existed, and at most, the reference to aggravated battery should be considered only harmless error.

The Petitioner's reliance on Cole v. Arkansas, 333 U.S. 196, 68 S.Ct. 514, 92 L.Ed. 644 (1948), for the proposition that the listing of the aggravated battery in the Georgia opinion demands a reversal, is inapposite, because Cole involved an entirely different factual situation from the present case. In Cole, a defendant had been charged by information with the violation of a specific code section, and likewise, was convicted of violating that same code section. On appeal the Arkansas Supreme Court affirmed the conviction as though the defendant had been tried and convicted for violating a completely different code section. This Court found such an affirmance by the Arkansas Supreme Court had violated the defendant's right to due process. However, in the case sub judice the Petitioner's death sentence is supported by the jury's finding of two separate aggravating circumstances, [Code §§27-2534.1 (b)(7) and (b)(2)], either of which alone is sufficient to support the challenged death penalty. Furthermore, as previously noted, the jury found two of the three illustrations listed in the "in that" clause of Code § 27-2534.1 (b)(7). Thus, the Georgia Supreme Court's reference to aggravated battery in its opinion simply has no bearing on whether the Petitioner's

death penalty is authorized when ample evidence supports the finding of all other aggravating circumstances.

Specifically with regard to the jury's finding of aggravating circumstances under Code § 27-2534.1(b)(7) the Petitioner contends the evidence was insufficient to show any torture of the victim, and thus the Georgia Supreme Court's affirmance of that portion of the aggravating circumstances authorizing the death penalty allegedly was erroneous. Contrary to the Petitioner's assertions, an examination of the transcript reveals sufficient evidence to support the jury's finding that the victim suffered from torture.

In the Petitioner's confession to the police, he related how he had smashed a whiskey bottle over the head of Dennis Beatenbo. He further admitted, "I reached in my belt with my right hand and pulled out my pistol and the guy was still lying on his back. I pointed the gun at the man and I pulled the trigger. I don't know how many times I shot him, but I could hear him moaning and trying to say something . . . ." (T. 151, Emphasis added).

Gwinnett County Medical Examiner, Doctor Donald Dove, performed the autopsy on Dennis Beatenbo. He testified that the victim had received a crushing blow to his face which had broken his nose and had extensively damaged the tissue around both eyes. There was also a bruise on the victim's forearm which was classified as a defensive type wound. (T. 102).

Furthermore, Doctor Dove testified that the victim suffered three separate chest wounds from a gun which had been placed against his body and fired. (T. 97). Although the cause of death was a bullet which passed through the victim's heart, Doctor Dove could not speculate in which order the chest wounds had been inflicted. (T. 98). Thus, the jury could have found that Dennis Beatenbo had been alive until the last shot was fired.

An additional fourth shot was fired into the victim's scrotum area; however, Doctor Dove theorized that this wound was implemented after the victim's death. (T. 98).

In summary, from viewing all of the evidence, it is apparent that a reasonable, rational juror could have concluded that Dennis Beatenbo had been struck violently across the face and shot at least twice in the chest before a third shot killed him. A reasonable juror could also have concluded that this attack resulted in agonizing pain to the victim before he died.

In light of this evidence showing that Dennis Beatenbo was severely struck in the head and shot four times by the Petitioner, this Court should reject the Petitioner's argument that there was no evidence of torture. Jackson v. Virginia, __U.S.__, 99 S.Ct. 2781 (June 28, 1979).

Likewise, Petitioner's death penalty is also authorized by the jury's finding that the murder was vile, horrible and inhuman in that it involved depravity of mind on the part of the defendant. The aforesaid facts surrounding the murder show a cold-blooded, brutal attack upon the victim. The jury's finding that the Petitioner exhibited depravity of mind can best be supported simply by a review of those facts, and by referring to a statement made by the Petitioner, "Danny why did you kill him?", the Petitioner answered, "Just to watch him die." (T. 168).

Although admittedly, the Georgia Supreme Court has stated that a statutory aggravating circumstance which consisted solely of a finding that the murder involved depravity of mind, would most likely not survive a constitutional challenge based on Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.E.2d 346 (1972), because of excessive broadness; however, the context in which that observation

was made is distinguhisable from the present case. The Georgia Supreme Court expressed that opinion in the recent case of Holton v. State, 243 Ga. 312, 318, __S.E.2d__ (March 6, 1979). In that case the jury had fixed the death sentence on two counts of murder based upon its finding that the defendant had exhibited depravity of mind. The jury's finding completely omitted all references to the words "outrageously or wantonly vile, horrible or inhuman." Respondent submits that if the phrase depravity of mind is supported by the jury's finding that the murder was outrageously or wantonly vile, horrible or inhuman, such would be sufficient to pass constitutional examination, especially when the jury finding is later examined upon review by the Georgia Supreme Court, and the facts of the murder are found to be sufficiently outrageous so as to be considered as lying at the "core" of the statute's intent. In any case, the Petitioner's death sentence in this case was not supported solely by the jury's finding that he had exhibited depravity of mind.

Finally, there was overwhelming evidence that the attack upon the victim had been motivated by an intent to "roll" him, and that twenty-two dollars and a watch were taken from the victim's body immediately before the murder. The Georgia Supreme Court correctly held in its review that this evidence sufficiently supported the jury's finding of aggravating circumstances under Ga. Code Ann. § 27-2534.1(b)(2).

Thus, since the court below fully considered and correctly decided that the Petitioner's death penalty was authorized by all of the jury's findings of statutory aggravating circumstances, the Petitioner's contentions I, II and III under his reasons for granting the writ, in support of his application for a writ of certiorari, should be found to be without merit.

B. THE OFFENSE OF ARMED ROBBERY MAY BE CONSIDERED AS "ANOTHER CAPITAL FELONY" UNDER GA. CODE ANN. § 27-2534.1(b)(2), AND THUS MAY SERVE AS AN AGGRAVATING CIRCUMSTANCE JUSTIFYING THE IMPOSITION OF THE DEATH PENALTY.

The Petitioner's final argument in support of his petition contends that since the death penalty may no longer be imposed for the offense of armed robbery in Georgia [Collins v. State, 239 Ga. 400, 404, 236 S.E.2d 759 (1977)], it is no longer a capital felony, and therefore, cannot be utilized under Ga. Code Ann. § 27-2435.1(b)(2) as a statutory aggravating circumstance supporting the imposition of the death penalty.

In Peek v. State, 239 Ga. 422, 238 S.E.2d 12 (1977), cert. den., __U.S.__, 99 S.Ct. 218 (1978), the Georgia Supreme Court specifically addressed the above issue which is raised by the Petitioner in the instant case. This presented a question of statutory interpretation to the court, and it concluded as follows:

> "We construe 'capital felony' as that term is used in § 27-2534.1(b)(2) in a generic sense to include those felonies which were capital crimes in Georgia at the time this section of our death penalty statute was enacted." Id., at p. 432.

The Georgia Supreme Court has continued to consistently hold that armed robbery is a capital felony for the purpose of finding aggravating circumstances. See, Bowden v. State, 239 Ga. 821, 829, 238 S.E.2d 905 (1977), cert. den., 435 U.S. 937 (1978); Davis v. State, 241 Ga. 376, 384, 247 S.E.2d 45 (1978), cert. den., 429 U.S. 122 (1978)

Armed robbery was an aggravating circumstance supporting the death penalty in Gregg v. Georgia, 428 U.S. 153, 161, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), and in Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977), this Court recognized without disapproval that under Georgia law armed robbery is considered a capital felony for the purpose of applying the aggravating circumstances provision of the Georgia Code. Id., 433 U.S. at p. 599, n. 15.

In holding that armed robbery may be considered a capital felony for the purposes of Code § 27-2534.1(b)(2), the Georgia Supreme Court has correctly applied the basic premise that the objective of a court in construing statutory construction is to ascertain the intent of the legislature and give effect to that legislative will. Philbrook v. Glodgett, 421 U.S. 707, 713, 95 S.Ct. 1893, 44 L.Ed.2d 525 (1975).

Thus, for these reasons the Petitioner's contentions, under section IV of reasons in support of his application for granting the writ of certiorari, should be found to be unmeritorious.

CONCLUSION

For all of the above and foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari in the present case be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John C. Walden, Attorney of Record for the Respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief in Opposition for the Respondent upon the Petitioner by depositing a copy of the same in the United States mail with adequate postage attached thereon and addressed to:

Mr. William H. Allen
Mr. John J. Donohue
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888 Sixteenth Street, N. W.
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This 6th day of December, 1979.

JOHN C. WALDEN